88-371

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

———

STATE OF VERMONT,
Petitioner,

v.

RICK A. PRESTON,
Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

———

SUSAN R. HARRITT
Counsel of Record
Office of the Attorney General
State of Vermont
109 State Street
Montpelier, VT 05602
(802) 828-3171

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether assignment of counsel at an arraignment, in satisfaction of Sixth Amendment requirements, automatically invokes a defendant's Fifth Amendment right to counsel, thereafter foreclosing any later attempt at interrogation of the defendant in an unrelated homicide investigation?

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No. ——

STATE OF VERMONT,

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v.

RICK A. PRESTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

OPINION BELOW

The opinion of the Supreme Court of Vermont is reported at 149 Vt. ——; it also appears at 543 A.2d —— (1988). The opinion is reprinted in Appendix A.

JURISDICTION

The Supreme Court of Vermont rendered its initial decision, affirming the trial court's grant of respondent's motion to suppress, on April 29, 1988. After a timely motion for reargument was filed by respondent, the Court reissued its decision on July 1, 1988 in slightly modified form with the entry order of affirmance unaffected. App. 9a.[1] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

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[1] A motion for reargument was timely filed by the State of Vermont based on the inclusion of new language in the July 1st de-

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence (sic) to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Law enforcement officials were unable to locate the respondent, who was wanted for questioning regarding the homicide of sixty-six year old man with whom he had resided. Since respondent had failed to appear for arraignment on an unrelated assault charge, an arrest warrant was issued and entered onto the National Crime Information Center computer with an indicaion that Vermont would extradite respondent. App. 2a-3a.

Respondent was located and arrested in Volusia County, Florida where he was arraigned and held in the local correctional facility as a fugitive from justice on the assault charge. At arraignment on the fugitive charge respondent requested counsel. App. 11a. Respondent later

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cision. This motion is still pending. Because it is unclear whether the state Supreme Court will view this second motion as tolling the running of the time period prescribed by Supreme Court Rule 20, the petitioner files this petition now in order to preserve its right to seek further review. The petitioner will immediately advise the Court of any decisions by the state Supreme Court.

testified that he sought counsel in order to receive "some legal advice on the matter before I went up against the judge." App. 20a. Respondent never met with Florida counsel, App. 20a, nor was he ever interrogated in connection with the assault offense.

Law enforcement officers from Vermont arrived in Florida to interrogate the respondent, still in custody as a fugitive from justice, concerning the unsolved homicide. App. 12a. The respondent received and waived properly administered *Miranda* warnings. At no time did he request counsel to assist him during these interrogation sessions. The respondent confessed to the killing and was returned to Vermont to face a charge of first degree murder. App 4a.

Prior to trial respondent filed a motion to suppress all written and oral statements made by him to Vermont law enforcement officers during the interrogation sessions which took place while he was in custody in Volusia County Correctional Center in Florida, while he was in transit after he waived extradition and was returning to Vermont; and while he was in custody in Vermont. These statements were made over a three-day period in March, 1986.

The trial court granted the respondent's motion to suppress after it determined that defendant's confession was not voluntary. The State sought review by interlocutory appeal to the lower court's decision, since the suppression of respondent's confessions was dispositive of the case. Without the respondent's statements, the State lacked vital proof regarding the elements of the offense.

The Vermont Supreme Court eschewed voluntariness as a basis for excluding the confession, holding instead, based solely on respondent's Fifth Amendment right to counsel, that the police erred when they interrogated the respondent. "[U]nder the 'bright line' rule enunciated in

Edwards and its progeny, we hold that the trial court was correct in concluding that defendant's waiver of his Fifth Amendment rights was invalid." App. 5a. Relying on *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir. 1987), *cert. denied*, 107 S.Ct. 3240 (1987), the Vermont Supreme Court determined that a defendant who accepts counsel at an arraignment for one offense is invoking his Fifth Amendment right to counsel regarding police interrogation for other, unrelated crimes.

REASONS FOR GRANTING THE WRIT

I. Clarification Is Required As *Edwards v. Arizona* Has Been Extended Beyond Its Intended Meaning.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court reaffirmed *Miranda v. Arizona*, 384 U.S. 436 (1966), by holding that an assertion of right to counsel during custodial questioning by a suspect brings all further questioning by law enforcement officials to a halt unless and until the suspect initiates contact. This Court has recently emphasized that "*Edwards* rested on the view that once 'an accused . . . *ha*[*s*] *expressed his desire to deal with the police* only through counsel' he should 'not [be] subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication.'" *Patterson v. Illinois*, —— U.S. ——, 108 S.Ct. 2389, 2394 (1988) (emphasis supplied), relying on *Edwards*, *supra*, at 484-85. As the Court cogently expressed in *Patterson*, "preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny. . . ." The Court acknowledged that suspects are otherwise free to make decisions regarding their cooperation with the police.

The Court has not issued any opinion on the scope of the rights implicated by a defendant's request for appointment of counsel. *Michigan v. Jackson*, 475 U.S. 625, 630 n. 4 (1986) (*Edwards* was applied to exclude

defendant's statements obtained in violation of his Sixth Amendment right to counsel). The Court has never extended *Edwards* to situations where counsel was never requested or sought *during custodial interrogation.* See, *Michigan v. Jackson, supra,* at 639 n. 2 (Rehnquist, J., dissenting). Petitioner asserts that nothing requires this extension constitutionally and that the Court must resolve this unanswered question to prevent unwarranted applications of *Edwards.*

This Court has recently issued its decision in *Arizona v. Roberson,* —— U.S. ——, 108 S.Ct. 2093 (1988). There, recognition was again given to "the prophylactic protections that the *Miranda* warnings provide to counteract the "inherently compelling pressures' of custodial interrogation. . . ." *Arizona, supra,* at 2097. The decision expanded the *Edwards* principles to an unrelated separate investigation involving custodial interrogation. The Court held that a suspect may not be interrogated in the absence of counsel once he has asked to speak with a lawyer in another criminal matter. These *Miranda* goals are implemented to protect the accused who believes that he is not capable of undergoing such questioning without advice of counsel. When no such showing appears, *i.e.,* when a suspect, never interrogated at all, feels he can handle himself during questioning and agrees to speak with the police after proper *Miranda* warnings are administered, assignment of counsel at arraignment on a different cause should not trigger a Fifth Amendment right to counsel that bars proper police investigation. Such an outcome would stretch *Edwards* beyond its logical limits.

II. The Importance Of The Question Presented Requires Acceptance Of The Petition.

Petitioner's question presents an important area of law requiring acceptance and decision by this Court. While the Court has issued numerous decisions distinguishing

the purpose inherent in each right to counsel,[2] one derived from the Fifth Amendment and the other found in the Sixth Amendment, courts continue to appear befuddled in their decisions. Simply put, the right to an attorney attaches once adversial judicial proceedings have commenced, whether or not the defendant has voiced a request for assistance. *United States v. Gouveia*, 467 U.S. 180, 188 (1984). Assignment of counsel guarantees the "core purpose" of the Sixth Amendment, i.e., to assure aid during the trial process.

The act of asking for an attorney does not convert a Sixth Amendment right to a Fifth Amendment protection. The Fifth Amendment right to counsel attaches only if an accused is in police custody and subjected to *police interrogation* or its functional equivalent. *Rhode Island v. Innis*, 446 U.S. 291 (1980). The right to counsel in a Fifth Amendment sense does not automatically attach when the other and separate Sixth Amendment right to counsel comes into being. Nor does the Fifth Amendment right to counsel block completely any attempt at interrogation when an accused is in custody. The right, of course, provides protections conveyed by *Miranda* warnings which safeguard an accused while at the same time allowing an educated waiver of rights, including the right to counsel. But a prior Sixth Amendment right should not be allowed to thwart properly conducted police investigation and concomitant informed decision-making by the same accused during a later and wholly unrelated interrogation.

III. Conflict Exists Between Circuit And State Court Decisions.

Federal circuit courts are sharply divided in their decisions concerning the extent of rights conferred by the assignment of counsel at arraignment. Because of the

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[2] For example, see, *Michigan v. Jackson*, *supra*, at 633, n.7; *Rhode Island v. Innis*, 446 U.S. 291, 300, no. 4 (1980).

lack of uniformity created by these contradictory decisions, law enforcement officers are uncertain about how to proceed in criminal investigations. Courts also experience difficulty in deciding cases due to shifting legal consensus.

In *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir. 1987), cert. denied, 107 S.Ct. 3240 (1987), the Seventh Circuit fashioned a decision, relied on by the Vermont Supreme Court, which extended this Court's ruling in *Edwards*. The circuit court opined that because Espinoza invoked his Fifth Amendment right to counsel at his arraignment on the weapons charge, the state was barred from initiating an interrogation of Espinoza without counsel concerning any crime for as long as he remained in continuous police custody. Despite the fact that the defendant's first and only invocation of his right to counsel occurred at arraignment, the assignment of counsel conferred a continuing Fifth Amendment benefit at an interrogation for a distinctly different offense. *United States v. Campbell*, 721 F.2d 578 (6th Cir. 1983), reaches this same conclusion as do *Wilson v. Murray*, 806 F.2d 1232 (4th Cir. 1986) and *Silva v. Estelle*, 672 F.2d 457 (5th Cir. 1982).

At least as many courts have reached exactly the opposite conclusion. Other federal courts have demonstrated a distinctly different interpretation regarding a request for counsel during court proceedings. A Fourth Circuit panel held that the *Edwards* rule did not apply to bar police-initiated interrogation even after defense counsel had been retained on another charge. *Butler v. Aiken*, 846 F.2d 255 (4th Cir. 1988). The decision specifically rejected the reasoning employed by the Seventh Circuit in the *Espinoza* case. "Properly initiated interrogation on entirely new charges does not intrude into an accused's previously invoked rights but rather offers that accused an opportunity to weigh his rights intelligently in light of changed circumstances." *Butler, supra*, at 259. Simi-

lar results were obtained in *Boles v. Foltz*, 816 F.2d 1132, 1135 (6th Cir. 1987) (defendant did not invoke his Fifth Amendment right to counsel when he stated that he wanted his attorney present at the preliminary hearing; "where it is clear that the defendant's request is for something other than the presence of an attorney during interrogation, the request should be so construed."); *Collins v. Francis*, 728 F.2d 1322 (11th Cir. 1984) (defendant's request for counsel at arraignment fails to indicate defendant would deal with police only through a lawyer; relying on the literal language in *Edwards* and *Fare v. Michael C.*, 442 U.S. 707, 717-18 (1979), for counsel in the Fifth Amendment sense to attach there must be police interrogation) and *Jordan v. Watkins*, 681 F.2d 1067 (5th Cir. 1982) (defendant never requested the assistance of counsel with respect to custodial interrogation; appointment was intended to assist defendant in further judicial proceedings). Additional examples of conflict among the circuit courts appear in *Jurek v. Estelle*, 623 F.2d 929, 939 (5th Cir. 1980) (en banc decision relying in pertinent part on *Blasingame v. Estelle*, 604 F.2d 893 (5th Cir. 1979)) and in *Blasingame, supra.* (request for attorney at arraignment does not suggest that "later police inquiry 'has impinged on the exercise of the suspect's continuing option to cut off the interview.' ", relying on *Nash v. Estelle*, 597 F.2d 573 (5th Cir. 1979) (en banc)).

State court decisions also illustrate division in the law. In *Currie v. State*, 512 N.E.2d 882 (Ind. App. 4 Dist. 1987), the court found that the *Edwards* rule applied after the defendant requested counsel at a probate cause hearing. In contrast, the Court is directed to *Ross v. State*, 326 S.E.2d 194, 199 (Ga. 1985) and *Tomlin v. Texas*, 690 S.W.2d 5, 8 (Tex. App. 9 Dist. 1984), for examples of decisions which reject defense arguments that a request for counsel before the court is equivalent to a request for counsel during interrogation.

IV. The Decision Below Is Erroneous.

The decision of the Vermont Supreme Court is erroneous. The court wrongly presumed that the defendant was invoking both his Sixth and Fifth Amendment rights to counsel when the defendant applied for counsel at the arraignment on the fugitive from justice charge. There was no showing that respondent felt unable to deal with the pressures of interrogation. In fact, respondent had not yet been interrogated; there was no basis on which to assume the assignment of counsel was intended to assist respondent during the rigors of interrogation. Indeed, he testified at the suppression hearing that "the main reason (he sought counsel) was for someone to talk to and to give me some legal advice on the matter before I went up against the judge." App. 20a. The Vermont Supreme Court's decision completely overlooks the factual circumstances at the time counsel was assigned. In *Patterson v. Illinois*, *supra*, at 2397-98, the Court brings its common sense to the analysis when it scrutinizes the purpose a lawyer might serve at that particular stage in the proceedings. The purpose to be served at the arraignment in Florida related solely to Sixth Amendment guarantees. The request for counsel was not related to the Fifth Amendment.

From a legal standpoint there is no reason to extend the *Edwards* rule to a situation where the accused has never expressed an unwillingness to respond to police interrogation. While respondent's request for counsel at arraignment effectively bars questioning without the presence of counsel on Sixth Amendment grounds, there is no justification for foreclosing police investigation of a separate crime in the absence of a request for counsel during interrogation. Where the accused has never expressed an inability to deal with the police and where there has been no repeated "badgering" by the police, such a decision forecloses, without a constitutional basis,

proper and necessary police work to the detriment of public safety.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court grant the petition for a Writ of Certiorari to review the decision of the Vermont Supreme Court.

Respectfully submitted,

SUSAN R. HARRITT
Counsel of Record
Office of the Attorney General
State of Vermont
109 State Street
Montpelier, VT 05602
(802) 828-3171

Dated: August 29, 1988

APPENDICES

APPENDIX A

SUPREME COURT

May Term, 1987

No. 87-023

STATE OF VERMONT

v.

RICK A. PRESTON

On Appeal from
District Court of Vermont,
Unit No. 3, Washington Circuit

(Filed July 1, 1988)

Alan W. Cook, J.

Jeffrey L. Amestoy, Attorney General, and David Tartter, Assistant Attorney General, Montpelier, for plaintiff-appellant.

Stephen S. Blodgett and Paul S. Volk of Blodgett & Watts, Burlington, for defendant-appellee.

Present: Allen, C.J., Peck, J., and Barney, C.J. (Ret.), Keyser, J. (Ret.) and Costello, D.J. (Ret.), Specially Assigned

COSTELLO, D.J. (Ret.), Specially Assigned. On January 20, 1986, Frank Evans was found murdered in his Barre apartment. While in custody on a unrelated charge, defendant confessed to the crime. He later filed a motion seeking to have his confession suppressed, and the district court granted the motion, ruling that his confession was involuntary and that the purported waiver of his Fifth Amendment rights was invalid. The state brought this interlocutory appeal pursuant to V.R.A.P. 5(b), and we affirm.

The trial court's detailed findings of fact describe the following sequence of events. An investigation team was formed soon after the murder, consisting of the Washington County state's attorney, an investigator from that office, and detectives from the Barre City police department and the Washington County sheriff's department. Defendant, who had resided with the victim, was regarded as the principal suspect, but he could not be located. The investigating team then became aware of unrelated, simple assault charges that had been pending against defendant since a New Year's Eve fracas in Montpelier. The assault citation required defendant to appear in court for arraignment on February 3, 1986, and the team planned to make contact with him at that time. Because the team wished to question defendant in a noncustodial setting and without the presence of counsel, the state's attorney decided not to file the information and affidavit regarding the assault charge.

Defendant failed to appear for the scheduled arraignment, however, and efforts to locate him continued to be unavailing. The team decided to obtain an arrest warrant on the simple assault charge and to use this pretext as a means of finding defendant and questioning him regarding the homicide. An information was filed on February 7, 1986, and a warrant was issued based on his earlier failure to appear. An investigator from the state's attorney's office circulated a nationwide "wanted

person" bulletin, using the National Crime Information Center (NCIC) computer.

On March 13, 1986, defendant was arrested in Florida and arraigned as a fugitive from justice. At arraignment on this charge he requested counsel, and the court appointed a public defender. The Vermont investigation team was informed of the arrest and immediately left for Florida to interrogate him. Upon arrival, the team was informed that defendant had been assigned counsel on the fugitive from justice charge and that he was being held in custody pending further proceedings on that charge. However, the team members made no effort to contact the appointed counsel before questioning him.

A Barre County police detective and the Washington County sheriff met with the defendant, who was still in custody, on March 15, 1986, two and one-half days after his arraignment. Defendant had yet to consult with his appointed attorney, although he had requested such a meeting once in writing and at least once orally.

The two police officers began their interrogation with amicable conversation about defendant's travels to Florida and about mutual acquaintances in Vermont. Forty minutes after they began questioning him, the officers read a *Miranda* warning. Defendant was asked if he understood each right after it was read to him, and he indicated that he did. Defendant then orally agreed to waive those rights, and the interrogation proceeded.

Approximately thirty minutes after the *Miranda* warning was given, defendant was asked about the Evans murder. At no time until this point, approximately one hour and fifteen minutes after confronting him, had the officers mentioned the homicide investigation. Although he initially denied the murder, defendant confessed his guilt soon after he was questioned directly about the killing. He then agreed to a taped interview, which was conducted after the two police officers consulted with the

state's attorney about the questions to be asked. The following day, March 16, 1986, defendant signed a written confession.

On March 17, 1986, defendant waived extradition and was transported back to Vermont. A second written confession was obtained on the morning after his arrival. Subsequently, he met with counsel for the first time since his arrest in Florida, and was then arraigned on a charge of first degree murder.

Defendant later filed a pretrial motion to suppress all inculpatory statements, written and oral, made to the investigating team. After a series of hearings, the trial court issued findings of fact and conclusions of law and granted defendant's motion. The ruling was based upon a "totality of the circumstances" analysis, and significant weight was assigned to the following factors: defendant's age of nineteen years, his eighth grade education, his inexperience with the criminal justice system, his isolation for more than two days prior to interrogation, and the absence of counsel. The court also emphasized the investigation team's intent to question defendant in a noncustodial, uncounselled setting and their failure to inform defendant regarding the subject matter of the questioning. The court concluded that the State had failed to prove either that defendant's *Miranda* waiver was voluntary, knowing, and intelligent or that his confession was voluntarily given. We affirm the court's ruling on the suppression motion, but we do so on other grounds.

The State argues first that the trial court erred in relying upon the factors cited in its totality of the circumstances analysis. It is unnecessary to address that contention, however, because the trial court's approach was rendered inapplicable by a single factor: defendant's request for counsel. Once a criminal defendant has invoked his right to counsel under the Fifth Amendment,*

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* The Fifth and the Sixth Amendment provide a criminal defendant with two distinct rights to counsel. No Sixth Amendment

he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). If the authorities initiate further interrogation in these circumstances, then any waiver of the defendant's right to counsel for that interrogation is invalid. *Michigan v. Jackson*, —— U.S. ——, 106 S. Ct. 1404, 1411 (1986).

Here, the lower court found that defendant requested counsel at his Florida arraignment on the fugitive from justice charge and that he made further requests to see his attorney while he was incarcerated. The court's findings also indicate that, despite this state of affairs, the investigation team proceeded to interrogate him in an uncounselled setting. Therefore, under the "bright line" rule enunciated in *Edwards* and its progeny, we hold that the trial court was correct in concluding that defendant's waiver of his Fifth Amendment rights was invalid. In reaching this conclusion, we acknowledge that two key issues are raised by the facts of this case: (1) whether defendant invoked this Fifth Amendment right to counsel at the Florida arrignment, and (2) whether any such invocation remained effective at the subsequent interrogation.

In *United States ex rel. Espinoza v. Fairman*, 813 F.2. 117 (7th Cir. 1987), *cert. denied*, 107 S. Ct. 3240 (1987), the Seventh Circuit resolved these same issues in the context of a markedly similar factual situation.

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analysis is included here because the constitutional right to counsel under that Amendment had not yet attached at the time of the interrogation regarding the murder. The Sixth Amendment right to counsel attaches only when a "critical stage of the prosecution" begins. *United States v. Wade*, 388 U.S. 218, 237 (1967). As the Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436 (1966), however, the Fifth Amendment provides "an individual held for interrogation . . . the right to consult with a lawyer and to have the lawyer with him during the interrogation." *Id.* at 471.

There, as here, defendant Espinoza was arrested and arraigned on a relatively minor charge. He requested counsel, and a public defender appeared on his behalf at the arraignment. While Espinoza remained in custody, police investigation indicated his possible involvement in a recent homicide. In the interview that followed, Espinoza waived his rights under *Miranda* and confessed to the murder.

After Espinoza's conviction on the murder charge was affirmed on appeal, a federal district court granted a habeas corpus petition, ruling that his confession should have been suppressed. The Seventh Circuit upheld the district court's decision on Fifth Amendment grounds, and its opinion included a painstaking analysis of the very issues presented here.

First, because Espinoza did not assert his constitutional rights at the interrogation itself, the court set out to determine whether his earlier request for counsel at the arraignment constituted an invocation of his Fifth Amendment right to counsel. Citing *Michigan v. Jackson*, —— U.S. ——, 106 S. Ct. 1404 (1986) and *Connecticut v. Barrett*, —— U.S. ——, 107 S. Ct. 828 (1987), the court rejected the state's argument that this request was no more than an assertion of Espinoza's Sixth Amendment right as an accused in that particular prosecution. *Jackson* and *Barrett* make clear, as the court explained, that a broad interpretation must be given to a defendant's request for counsel, and that a court must presume, absent evidence to the contrary, that such an individual has invoked the full extent of his constitutional right to counsel. See *Jackson*, —— U.S. at ——, 106 S. Ct. at 1409 and *Barrett*, —— U.S. at ——, 107 S. Ct. at 823. Therefore, the *Espinoza* court reasoned, it must be presumed that a defendant who requests or accepts counsel at an arraignment is invoking both his Sixth Amendment and his Fifth Amendment rights. *Espinoza*, 813 F.2d at 123. Because the state presented no evidence indicating that

Espinoza intended to limit his invocation to the Sixth Amendment, the court concluded that his unqualified acceptance of counsel at the arraignment was an assertion, rather than a waiver, of his Fifth Amendment rights. *Id.*

The Seventh Circuit went on to decide whether this invocation at the arraignment remained effective at the subsequent, but unrelated, murder interrogation. The court first held that, once asserted, the Fifth Amendment right to counsel terminates "only when the heightened potential for state-coerced self-incrimination ends—upon the release of the individual from police custody." *Id.* at 125. The court then concluded that Espinoza's invocation of his right at the arraignment also extended to the later interrogation regarding the murder. *Id.* at 126. If the rule were otherwise, the court reasoned, then the prophylactic purpose of the Fifth Amendment would be defeated because the heightened possibility of state "overreaching" continues to exist regardless of the timing or the subject matter of custodial interrogation. Citing *Edwards v. Arizona*, 451 U.S. at 484-85, the court held that the waivers obtained from Espinoza at the murder interrogation were invalid because the state initiated the questioning.

We adopt the reasoning of the Seventh Circuit. Here, defendant asked that an attorney be appointed to represent him in dealing with the State, and he continued his efforts to consult counsel while he was being held in custody. We will not assume that defendant was in some way limiting his request for legal counsel; indeed, we must presume that defendant was invoking both his Sixth Amendment right and his Fifth Amendment right to counsel, and the State has not shown otherwise. As the Supreme Court has observed, an individual requesting counsel at his arraignment does not know which constitutional right he is invoking. *Jackson*, —— U.S. at ——, 106 S. Ct. at 1409-10 n.7 (quoting *Michigan v. Jackson*,

421 Mich. 39, 63-64, 365 N.W.2d 56, 67 (1984)). We hold that defendant's invocation of his Fifth Amendment right remained effective at the time of the interrogation, and that, because the State impermissibly initiated that interrogation, his purported waivers of this right were invalid.

Affirmed.

FOR THE COURT:

/s/ Edward J. Costello
EDWARD J. COSTELLO
D.J. (Ret.)
Specially Assigned

APPENDIX B

ENTRY ORDER

SUPREME COURT DOCKET NO. 87-023
JUNE TERM, 1988

STATE OF VERMONT

v.

RICK A. PRESTON

Appealed From District Court of Vermont,
Unit No. 3, Washington Circuit
Docket No. 332-3-86 WnCr

(Filed July 1, 1988)

In the above entitled cause the Clerk will enter:

After the opinion in this case had been issued, defendant moved for leave to reargue. Some minor revisions to the opinion have been made, but the entry order is not affected.

Motion denied.

BY THE COURT:

/s/ Frederic W. Allen
FREDERIC W. ALLEN
Chief Justice

/s/ Louis P. Peck
LOUIS P. PECK
Associate Justice

/s/ Albert W. Barney
ALBERT W. BARNEY
Chief Justice (Ret.)
Specially Assigned

/s/ F. Ray Keyser
RAY KEYSER
Associate Justice (Ret.)
Specially Assigned

/s/ Edward J. Costello
EDWARD J. COSTELLO
District Judge (Ret.)
Specially Assigned

APPENDIX C

VERMONT DISTRICT COURT
UNIT II, WASHINGTON CIRCUIT

Docket No. 332-3-86 WnCr

STATE OF VERMONT)
) ss.
WASHINGTON COUNTY)

STATE OF VERMONT

v.

RICK A. PRESTON

STIPULATION/FLORIDA

1. On March 13, 1986, Rick A. Preston was arrested by Officer Monroe of the Ormond Beach, Florida police department.

2. Rick Preston had entered the police station seeking shelter and to report being robbed. After becoming suspicious, Officer Monroe ran a NCIC check on him. As a result of a "hit", Preston was arrested on a fugitive from justice charge arising out of the warrant for his arrest obtained in connection with the charge of simple assault.

3. He was arraigned on the charge on March 13, 1986, in the Volusia County Court. He was found to be indigent, and after requesting counsel, was appointed the services of the Volusia County Public Defender.

4. Washington County State's Attorney Terry Trono, Sheriff Ronald West, Detective Brent Curtis of the Barre City Police Department, Lawrence Dodge, Investigator for Terry Trono, Scott Vanderbush of the Barre City Police Department, and Sgt. Ronald DiVincenzi of the Vermont State Police all travelled to Volusia County on or about March 13, 1986.

5. Conversations were had by the State's Attorney and the investigating officers with local police, prosecutors and corrections personnel. As a result of these conversations, the investigating officers became aware, prior to the interrogation of the defendant, that he had been arrested on the Vermont warrant, that he had appeared before a local Judge on March 13, 1986, that he had requested and been assigned counsel on the fugitive from justice charge, and that he was being detained pending further proceedings at the Volusia County Correctional facility.

6. On March 15, 1986, Rick Preston was interrogated by Sheriff West and Detective Curtis at the Volusia County Correctional facility while in custody.

7. No contact with Rick Preston's local counsel was attempted. The officers believed that the law did not require it.

8. Prior to being advised of his rights Preston was not told that he was about to be interrogated in connection with the death of Frank Evans.

9. At no time during the interrogation was the simple assault charge mentioned.

10. Rick Preston admitted that he had killed Frank Evans during the interrogation on March 15, 1986.

11. He made a subsequent confession on March 16, 1986 after having been moved to the Volusia County Jail, again to Sheriff West and Detective Curtis.

12. On March 17, 1986, Rick Preston appeared before Judge Blount of the Volusia County Circuit Court, was advised of his rights, and waived extradition on the charge of assault.

13. Rick Preston was returned to Vermont on March 17, 1986, around midnight, by Sheriff West and Detective Curtis.

14. He was lodged on the night of his return at the Barre City lock-up. He confessed again, on ——— March 18, 1986. Rick Preston was arraigned in Barre on March 18, 1986 at approximately 3:00 P.M.

15. The following documents may be admitted into evidence:

a. Certified copy of arrest report of Officer Alfred Monroe, containing thereon judicial determinations of Judge Graziano.

b. Certified copy of Waiver of Extradition signed by Rick A. Preston.

c. Copy of NCIC entry form signed by Douglas Hoyt, typed by Holly Gavin, based on information provided by Lawrence Dodge, dated February 7, 1986.

d. Xerox copy of print out of temporary felony wanted person entry into NCIC computer. Information entered by Holly Gavin from facts provided by Lawrence Dodge on February 7, 1986.

e. Information, affidavits, citation, application for warrant, and warrant all in connection with the simple assault charge filed against Rick Preston on February 7, 1986.

f. *Vermont Criminal Information Center, Contributor Guidelines,* which describes the operations and procedures applicable to the introduction of data onto the National Crime Information Center computer.

Dated at Barre in the County of Washington and State of Vermont this 25th day of July, 1986.

RUBIN, RONA, KIDNEY & MYER

By /s/ _____
RICHARD I. RUBIN
Defendant's Attorney

STATE OF VERMONT

By /s/ _____
TERRY TRONO

By /s/ _____
DAVID E. TARTTER
Attorneys for the State

/s/ _____
RICK A. PRESTON

APPENDIX D

VERMONT DISTRICT COURT
UNIT II, WASHINGTON CIRCUIT

Docket No. 332-3-86, WnCr

STATE OF VERMONT)
) ss.
WASHINGTON COUNTY)

STATE OF VERMONT

v.

RICK PRESTON

STIPULATION/VERMONT

The State and the Defendant stipulate to the following facts:

1. Frank Evans was found murdered in his apartment on South Main Street in Barre, Vermont on January 20, 1986.

2. An investigation was immediately begun to attempt to locate the perpetrator and an investigative group consisting of Terry Trono, Washington County State's Attorney, Brent Curtis, Barre City Police Department, Ronald West, Washington County Sheriff, and Lawrence Dodge, Investigator with the Washington County State's Attorney's office. This group met frequently and the investigation was coordinated by its members.

3. The investigation very shortly focused on the defendant, Rick Preston. Preston had resided with the deceased and was missing. He became a principal suspect.

4. It became a major objective of the investigating team to question Preston. Information was released to the press indicating that Preston was not a suspect, in order that he not be deterred from talking to the investigating officers. The primary motive was to discourage flight.

5. On or about December 31, 1985 Rick Preston was cited to appear on a misdemeanor charge of simple assault. The citation was issued by Montpelier Police Officer Kent Goslant and arose out of an altercation on New Year's Eve between Rick Preston and Carmel Edson during which Rick Preston was alleged to have slapped Carmel Edson. This charge was not solicited by the State's Attorney or any other police agency in connection with the investigation of the Evans' homicide. The offense occurred in Montpelier.

6. The citation required Rick Preston to appear in the Vermont District Court in Barre on February 3, 1986.

7. Prior to February 3, 1986, the State's Attorney, Terry Trono, decided not to file the simple assault information, out of concern that an uninformed arresting agency could compromise the investigation.

8. Rick Preston did not appear for his arraignment on February 3, 1986.

9. During the following several days discussions were held by Terry Trono, Detective Curtis, Sheriff West, and Lawrence Dodge concerning the advisability of obtaining a warrant on the simple assault charge.

10. No probable cause existed to seek a warrant on the homicide.

11. By February 7, 1986 the investigating officers and Terry Trono concluded that Rick Preston had probably left the state and that the most effective way to find and

hold him for questioning was to obtain a warrant for his arrest on the simple assault charge.

12. On February 7, 1986 the information charging simple assault was filed and Lawrence Dodge filed a supplemental affidavit in support of the application for a warrant. Probable cause was found by Honorable Judge Cook, and a warrant was issued on February 7, 1986 for failure to appear on February 3, 1986.

13. It was the intention of the officers investigating the homicide to use the warrant which could be issued on the unrelated simple assault charge to locate, hold, and question Rick Preston concerning the murder of Frank Evans.

14. The officers investigating the homicide had no concern with the prosecution of the misdemeanor assault charge. The State's Attorney, however, would have prosecuted this charge and requested a warrant in the normal course of business.

15. Lawrence Dodge, Investigator for the State's Attorney, arranged to have a temporary wanted persons bulletin placed in the National Crime Information Center (NCIC) on February 7, 1986.

16. On that same day, at the request of Lawrence Dodge, a NCIC entry form for wanted persons was prepared. This form is the standard form which must be completed prior to any permanent entry for wanted persons being made in the NCIC.

17. The entry form advised, among other details, that Rick Preston was charged with simple assault, was considered dangerous, and armed with a knife.

18. Any persons locating Rick Preston were advised to contact Brent Curtis of the Barre City Police Department or the Washington County State's Attorney's office.

19. The request to hold was entered for the entire United States.

20. The warrant issued for the arrest of Rick Preston on a misdemeanor charge of simple assault would not have been entered on to the NCIC were it not for the desire of the investigating officers to locate and hold Rick Preston for questioning on the homicide.

21. The entry of this warrant into the NCIC was authorized by Terry Trono for the sole purpose of locating Rick Preston for questioning.

22. In 1985, 314 arrest warrants, in all categories, issued in Washington County. Only five were entered in the NCIC.

Dated at Barre in the County of Washington and State of Vermont this 25th day of July, 1986.

RUBIN, RONA, KIDNEY & MYER

By /s/ _____
RICHARD I. RUBIN
Defendant's Attorney

STATE OF VERMONT

By /s/ _____
TERRY TRONO

By /s/ _____
DAVID E. TARTTER
Attorneys for the State

/s/ _____
RICK PRESTON

APPENDIX E

WASHINGTON CIRCUIT
UNIT NO. 2

Docket Number 332-3-86 WnCr

STATE OF VERMONT)
) ss.
WASHINGTON COUNTY)

STATE OF VERMONT

v.

RICK PRESTON

MOTION TO SUPPRESS
CONTINUED
ON
AUGUST 14, 1986

---

* * * *

[Questions by Defense Counsel. Answers by Respondent.]

[8] Q. You did go to court on Thursday afternoon?

A. Yes.

Q. Tell us about that?

A. Well, I was brought behind—in front of a lady judge that was there and she told me about what I was charged for and where it was from and she also asked me if I wanted a lawyer and, if not, if I would like a public defender.

Q. Had you filled out any papers before you went before the judge?

A. Yes, I did.

Q. And did those papers have anything to do with getting [9] a lawyer?

A. Yes, they did.

Q. And did you ask for a lawyer? In those papers?

A. Yes, I did.

Q. So when you went before the woman judge, did she ask you again whether you wanted a lawyer?

A. Yes, she did.

Q. And what did you tell her?

A. I said, yes, I would like one.

Q. Did you get to meet with a lawyer before you went before the judge?

A. No.

Q. Did you get to meet with a lawyer or with a lawyer standing next to you when you stood up in front of the judge?

A. No.

Q. After you left—got through being right in front of the judge, did you get to see a lawyer right there in the courtroom at any time?

A. No, I didn't.

Q. Did you expect that you would be able to see a lawyer at that time?

A. Yes.

Q. Why did you want a lawyer?

A. Well, the main reason was for someone to talk to and to give me some legal advice on the matter before I went up against [10] the judge.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
SEP 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-371

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF VERMONT,
PETITIONER

V.

RICK A. PRESTON,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VERMONT

RESPONDENT'S BRIEF IN OPPOSITION

Henry Hinton
Counsel of Record

William A. Nelson
Appellate Defenders
Office of the Defender General
State Office Building
141 Main Street
Montpelier, VT 05602
(802) 828-3168

Stephen S. Blodgett
Blodgett and Watts
72 Hungerford Terrace
P. O.Box 8
Burlington, VT 05402
(802) 862-8919

Counsel for Respondent

QUESTION PRESENTED

When a criminal prosecution is brought solely for the purpose of subjecting the accused to custodial interrogation on a second, uncharged, offense, does the accused's assertion of his right to counsel on the charged offense invoke his right to counsel in connection with custodial interrogation on the uncharged offense?

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STATEMENT OF THE CASE

Respondent was sought by Vermont authorities for questioning about a homicide. The authorities planned to use the occasion of respondent's scheduled arraignment on another charge to question him about the homicide. When respondent failed to appear for arraignment on that charge, "[t]he team of [investigators] decided to obtain an arrest warrant on the simple assault charge and to use this pretext as a means of finding [respondent] and questioning him regarding the homicide." Pet., App. 2a. Respondent was arrested in Florida as a fugitive on the simple assault charge and placed in custody. At arraignment on that charge, "he requested counsel." id., 3a, and the Vermont authorities who came to Florida to question respondent about the homicide were "informed that [respondent] had been assigned counsel on the fugitive from justice charge and that he was being held in custody pending further proceedings on that charge. However, the team members made no effort to contact the appointed counsel before questioning him," id. Respondent remained in custody continuously from his arrest in Florida until his custodial interrogation by Vermont authorities two and one-half days after his Florida arraignment. Id. The Vermont Supreme Court found that respondent, during his custody in Florida, "requested...a meeting [with his appointed Florida] attorney once in writing and at least once orally." Id.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE DECISION APPEALED FROM IS NOT FINAL

The state seeks review of the decision of the Vermont Supreme Court filed July 1, 1988. This is not the final decision in this appeal. As noted in its petition (at 1, n.1), the state filed a timely motion for reargument of the July 1 decision on July 8, 1988. See Vermont Rule of Appellate Procedure 40. This motion was denied by order filed September 2, 1988, after the petition was filed in this Court. On September 9, 1988, the state again filed a timely motion for reargument of the Vermont Supreme Court's

September 2 order; this motion is still pending.

Rule 20.4 of the rules of this Court provides that if a petition for rehearing is timely filed by any party, the time for filing a petition for a writ of certiorari runs from the date of denial of rehearing or entry of a subsequent judgment entered on the rehearing. The state's petition thus seeks review of a nonfinal judgment. Chicago G.W.R. Co. v. Basham, 249 U.S. 164, 167 (1919).

Since the decision appealed from is not the Vermont Supreme Court's latest, or its last, judgment in this matter, the writ should be denied.

II. PETITIONER SEEKS REVIEW OF A QUESTION NOT PRESENTED BY THE UNIQUE FACTS OF THIS CASE; THAT QUESTION IS NOT OF NATIONAL IMPORTANCE

The question presented by petitioner, Pet. i, is not the question presented by the case. The issue is not whether invocation of the right to counsel in one proceeding forecloses later interrogation "in an unrelated... investigation", Pet. i. We can assume (for purposes of this argument only) that that question can be answered in the negative (but see Arizona v. Roberson, ___U.S.___, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988)), and that in the normal case an accused's request for counsel at arraignment does not protect him against custodial interrogation on a completely different offense. Cf. Hoffa v. United States, 385 U.S. 293, 308 (1966), upholding the admission of post-indictment statements "relat[ing] to the commission of a quite separate offense." Room must nevertheless be made for the exceptional case, in which formal criminal proceedings have been initiated solely as a pretext to make the accused available for custodial interrogation in connection with a second, uncharged offense. In such a situation it would be pure formalism to hold that a request for counsel made in connection with the charged offense does not invoke the right to counsel in connection with the very custodial inter-

rogation for which that charge was brought.[1]

This is that deviant case. The defendant was cited for simple assault and failed to appear. Following his failure to appear the investigators, suspecting him of involvement in a homicide, "decided to obtain an arrest warrant on the simple assault charge and use this pretext as a means of finding defendant and questioning him regarding the homicide." Pet. 2a. The formal commencement of the simple assault prosecution, the arrest warrant, and the NCIC request for defendant's arrest, were all undertaken solely as a means to this end. See also the Trial Court's Findings of Fact, attached hereto as an appendix, Par. 5-25.

It is true that the question which this case properly presents has not been passed on by this Court. But the issue arises so infrequently, and has been of so little concern to the lower courts, that it cannot be characterized as one of national importance, nor, given the dearth of reported decisions, is it a question about which the courts of appeals are in disagreement.

Former Chief Justice Burger, writing in dissent in Maine v. Moulton, 474 U.S. 159, 185 (1985), noted that courts were in agreement that Massiah v. United States, 377 U.S. 201 (1964) "does not prohibit the introduction of incriminating statements obtained in good faith by the Government even after an indictment at a trial involving an offense different from that covered by the indictment," (emphasis added).

The implied exception is a narrow one. Two prosecutions may be related and yet be "different" offenses for purposes of Massiah. See United States v. Lisenby, 716 F.2d 1355, 1359 (11th Cir. 1983); United States v. Grego, 724 F.2d 701, 702-3 (8th Cir. 1984). In United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir. 1987), cert. denied, 107 S.Ct. 3240 (1987), the court held that two offenses related only by the fact that the same weapon was involved in both were clearly different offenses for Massiah purposes,

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[1]The sixth amendment right to counsel may attach even though no formal accusatory pleading has been filed. Escobedo v. Illinois, 378 U.S. 478, 485 (1964); DeAngelo v. Wainwright, 781 F.2d 1516 (11th Cir. 1986).

noting that there had been no claim that the offenses "were part of any pattern or plan." Id., at 121, n. 1. See also United States v. Chu, 779 F.2d 356, 367-68 (7th Cir. 1985). The same result was reached in Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988). In Butler, as here, the accused was arrested on an assault charge, asserted his right to counsel (by retaining counsel), and was subsequently questioned in an unrelated murder investigation. The Fourth Circuit held the confession admissible, noting that there had been no suggestion "that Butler's arrest on the assault charges was a sham intended to make him available for questioning upon a more serious offense." Id., at 258. Beyond these dicta, little has been written on the subject.

The issue is interesting but not nationally important. Cf. Lisenby at 1361 (Godbold, J., dissenting) ("Differing views of judges about what is the same offense and what are separate offenses under the facts of a particular case is hardly, by itself, a subject for en banc consideration.") Given the paucity of reported cases no split in opinion (indeed, very little opinion at all) can be shown.

III. THE VERMONT SUPREME COURT'S DECISION DOES NOT EXTEND EDWARDS V. ARIZONA; THE DECISION IS A CORRECT APPLICATION OF THIS COURT'S RECENT DECISIONS CONSTRUING EDWARDS

The Vermont Supreme Court's decision in this case follows logically from this Court's holdings in Michigan v. Jackson, 475 U.S. 625 (1986) and Arizona v. Roberson, ___U.S.___, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988).

At the outset, respondent notes that petitioner misstates its "Question Presented": this case does not present the question whether mere assignment of counsel "automatically invokes a defendant's Fifth Amendment right to counsel." Respondent did more than "accept counsel at an arraignment," Pet. 4; he requested counsel at arraignment, as the state elsewhere concedes (Pet. 2) and the Vermont Supreme Court found.

Michigan v. Jackson establishes that a request for counsel at arraignment protects a defendant's fifth amendment privilege

against self-incrimination by barring subsequent custodial interrogation initiated by state authorities. While Edwards v. Arizona, 451 U.S. 477 (1981), involved a request for counsel during custodial interrogation, Jackson forecloses the argument that a request for counsel at arraignment does not protect a defendant during later custodial interrogation. Petitioner is thus incorrect in asserting that "[t]he Court has never extended Edwards to situations where counsel was never requested or sought during custodial interrogation," Pet.5 (emphasis in original).

Jackson accepted the state court's conclusion that the source of those defendants' protection was the sixth amendment right to counsel, since, as in this case, the sixth amendment right to counsel had attached.[2] But nothing in Jackson suggests that an entitlement to counsel under the sixth amendment, and a request therefor, gives a defendant less protection for his privilege against self-incrimination than a request for counsel arising solely from fifth amendment entitlements. On the contrary,

> In our opinion..., the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before. Id., at 631.

Petitioner also asks this Court to assume that respondent made a limited request for counsel that did not cover custodial interrogation. The Court's clear rule is just the opposite: unless the defendant himself clearly and unequivocally limits his request for counsel--not the case here--the request will be given an expansive construction. Connecticut v. Barrett, ___U.S.___, 107 S.Ct. 828, 93 L.Ed.2d 420 (1987).

Finally, the state's attempt to escape the requirements of Edwards by reliance on an "unrelated crime" theory is foreclosed by Arizona v. Roberson, ___U.S.___, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). Even if the homicide case is viewed as unrelated to the fugitive/simple assault case, respondent's assertion of his right

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[2]The Court did not hold, however, as had the Michigan state court, that Jackson did not also have or assert fifth amendment right to counsel protections at arraignment. See 475 U.S. at 630, n. 4.

to counsel on the latter is effective as to the former since respondent remained in continuous custody after he asked for counsel on the Florida arrest until after his interrogation about the homicide. While the Vermont Supreme Court did not expressly rely on Roberson, it relied on a holding which this Court approved in Roberson. See United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir 1987), cert. denied, 107 S.Ct. 3240 (1987), cited in Roberson, 100 L.Ed.2d at 712 n. 3.

The Vermont Supreme Court's decision is a correct application of settled law to the facts and presents no question of general importance. The conflict in decisions of lower courts is illusory; all the state and Federal circuit decisions cited in favor of petitioner's position predate Roberson. At least one of these courts has changed its views in light of Jackson and now follows Espinoza. Cervi v. Kemp, ___F.2d ___, 1988 Westlaw 90120 (11th Cir. August 26, 1988), pages 18-19, n.11. The court below fully considered and correctly decided the issues in light of this Court's precedents.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Henry Hinton
Counsel of Record

William A. Nelson
Appellate Defenders
Office of the Defender General
State Office Building
141 Main Street
Montpelier, VT 05602
(802) 828-3168

Stephen S. Blodgett
Blodgett and Watts
72 Hungerford Terrace
P. O.Box 8
Burlington, VT 05402
(802) 862-8919

Counsel for Respondent

Dated: September 28th, 1988

CERTIFICATE OF SERVICE

I certify that I served the foregoing Respondent's Brief in Opposition by mail on Susan R. Harritt, Esq., Counsel of Record for Petitioner, Office of the Attorney General, State of Vermont, 109 State Street, Montpelier, VT 05602, on the 28th day of September, 1988. All parties required to be served have been served.

Henry Hinton

APPENDIX

STATE OF VERMONT

WASHINGTON COUNTY, ss

State of Vermont	District Court of Vermont
v.	Unit #2, Washington Circuit
Rick Preston	Docket No. 332-3-86WnCr

Findings of Fact, Conclusions of Law and Order

Defendant is charged with first degree murder pursuant to common law and 13 V.S.A. §§ 2301 and 2303. Defendant has moved to suppress and exclude from evidence at trial all written and oral statements he made to the police during the period of March 15, 1986 through March 18, 1986. Hearings were held before the undersigned on defendant's motion on July 25th and August 14, 1986. Defendant was present with his then attorney, Richard I. Rubin, Esq. He is now represented by Stephen S. Blodgett, Esq. Appearing for the State were Terry Trono, Washington County State's Attorney and David Tartter, Assistant Attorney General.

At the hearings, the State presented testimony of Sheriff Ronald West, Lawrence Dodge, and Detective Brent Curtis. Defendant testified and offered the testimony of

Carolyn Hutchinson and Constance Keresy.

The parties submitted proposed findings of fact and memoranda of law. Based on the arguments of counsel, credible evidence of record and applicable law, the court makes the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

1. Frank Evans was found murdered in his apartment on South Main Street in Barre, Vermont on January 20, 1986.

2. An investigation was immediately begun to attempt to locate the perpetrator and an investigative group was formed consisting of Terry Trono, Washington County State's Attorney, Detective Brent Curtis, Barre City Police Department, Ronald West, Washington County Sheriff, and Lawrence Dodge, Investigator with the Washington County State's Attorney's office. This group met frequently and the investigation was coordinated by its members.

3. The investigation very shortly focused on the defendant, Rick Preston. Defendant had resided with the deceased and was missing. He became a principal suspect.

4. It became a major objective of the investigating team to question defendant. Information was released to

the press indicating that defendant was not a suspect, in order that he not be deterred from talking to the investigating officers. The primary motive was to discourage flight.

5. On or about December 31, 1985 defendant was cited to appear on a misdemeanor charge of simple assault. The citation was issued by Montpelier Police Officer Kent Goslant and arose out of an alleged altercation on New Year's Eve between defendant and Carmel Edson during which defendant was alleged to have slapped Carmel Edson. This charge was not solicited by the State's Attorney or any other police agency in connection with the investigation of the Evans murder. The offense occurred in Montpelier.

6. The citation required defendant to appear in the Vermont District Court in Barre on February 3, 1986.

7. The team decided not to file the simple assault information and affidavit, out of concern that should defendant fail to appear and an arrest warrant issue an uninformed arresting agency could compromise the investigation.

8. An additional concern that prompted the decision not to file the simple assault information was that defendant's potential appearance at the arraignment and request for a public defender would impede the investigation.

9. The team wished to question defendant uncounseled in a non-custodial setting if possible.

10. Detective Curtis was sent to the courthouse to meet him but defendant did not appear for his arraignment on February 3, 1986.

11. During the next few days, as they had been unable to establish contact with the defendant, State's Attorney Trono, Detective Curtis, Sheriff West, and Lawrence Dodge discussed the advisability of obtaining a warrant on the simple assault charge.

12. No probable cause existed to seek a warrant for defendant's arrest on the homicide.

13. By February 7, 1986, the investigating officers and State's Attorney Trono concluded that defendant had probably left the state and that the most effective way to find and hold him for questioning on the murder was to obtain a warrant for his arrest on the simple assault charge.

14. On February 7, 1986 the information charging simple assault was filed and Lawrence Dodge filed a supplemental affidavit in support of the application for a warrant. Probable cause was found and a warrant was issued on February 7, 1986 for failure to appear on February 3, 1986.

15. It was the intention of the officers investigating the homicide to use the warrant which could

be issued on the simple assault charge to locate, hold, and question Rick Preston concerning the murder of Frank Evans.

16. The officers investigating the homicide had no concern with the prosecution of the misdemeanor assault charge. The State's Attorney, however, would have prosecuted this charge and requested a warrant in the normal course of business.

17. Defendant would not have been extradited on the simple assault charge from beyond the boundaries of Vermont were it not for the desire of the team investigating the homicide to question him concerning his involvement in the death of Frank Evans.

18. Lawrence Dodge arranged to have a temporary wanted persons bulletin placed in the National Crime Information Center (NCIC) on February 7, 1986.

19. Lawrence Dodge entered a "temporary felony want" (Defendant's Exhibit #D). The NCIC Operating Manual describes the criteria for entry in a wanted person file. It states in pertinent part:

> 6. A temporary felony want record, message key (MKE) code ET, may be entered to establish a "want" entry when a law enforcement agency needs to take prompt action to apprehend a person who has committed, or the officer has reasonable ground to believe has committed a felony.

(emphasis in original; Defendant's Exhibit #F at 7-1, 7-2).

20. The NCIC entry form that was used is the standard form which must be completed prior to any permanent entry for wanted persons being made in the NCIC.

21. The entry form advised, among other details, that defendant was charged with simple assault, was considered dangerous, and armed with a knife.

22. The finding and holding state was instructed to contact Detective Brent Curtis, who was the chief investigating officer on the homicide investigation. The Montpelier Police Department that originated the simple assault charge was not to be the point of contact.

23. The request to hold was entered for the entire United States.

24. In 1985, 314 arrest warrants, in all categories, issued in Washington County. Only five were entered in the NCIC.

25. On March 13, 1986, defendant was arrested by Officer Monroe of the Ormond Beach, Florida Police Department.

26. Defendant was nineteen years old at the time of his arrest. He had completed the eighth grade at Lamoille Union High School. He had never been incarcerated before his arrest on March 13, 1986.

27. Defendant had entered the Ormond Beach Police Station voluntarily, seeking shelter and to report being robbed. After becoming suspicious, Officer Monroe ran a NCIC check on him. As a result of a "hit", defendant was arrested on a fugitive from justice charge arising out of the warrant for his arrest obtained in connection with the Vermont charge of simple assault.

28. Defendant was arraigned on the fugitive from justice charge on March 13, 1986, in the Volusia County, Florida Court. He was found to be indigent, and after requesting counsel, was appointed the services of the Volusia County Public Defender.

29. Defendant attempted to contact a former employer while he was in jail but the individual refused to accept his collect call.

30. Defendant believed his mother lived near his place of incarceration; he did not know how to reach her.

31. Defendant testified without corroboration that he requested counsel five to ten times while he was in jail. Based on credible evidence, the court finds that he made one written and one oral request for counsel. At no time did he meet with an attorney.

32. At 11:00 A.M., Saturday, March 15, 1986 when he met with Sheriff West and Officer Curtis, defendant had been incarcerated without access to counsel for two and one half days.

33. Defendant testified that he made no friends while in jail and that he was uncomfortable and afraid of his Black cell-mates.

34. On or about March 13, 1986, when word was received that defendant had been arrested, the team decided to travel to Florida.

35. Prior to their arrival in Florida no member of the team informed the authorities at the correctional center that they planned to meet with defendant there.

36. The State's Attorney and other team members converged on Volusia County, Florida at different times, State's Attorney Trono, Lawrence Dodge, and Officer Scott Vanderbush of the Barre City Police Department, and Sargeant Ronald DiVincenzi traveled from Vermont. The others were on vacation at the time. Detective Curtis traveled from the Caribbean and Sheriff West from South Carolina.

37. On arrival and before attempting any interview with defendant, State's Attorney Trono and the officers spoke with local police, prosecutors and corrections personnel. As a result of these conversations, the investigating officers became aware, prior to the interrogation of the defendant, that he had been arrested on the Vermont warrant, that he had appeared before a local judge on March 13, 1986, that he had requested and been assigned counsel on the fugitive from justice charge,

and that he was being detained pending further proceedings at the Volusia County Correctional Facility.

38. On Saturday, March 15, 1986, Sheriff West and Detective Curtis went to the Volusia County Correctional Facility where defendant was in custody, with the intent to interrogate him about the Evans homocide.

39. No prior contact with defendant's local counsel was attempted. The officers believed that the law did not require it.

40. Sheriff West and Detective Curtis were permitted to see defendant at approximately 11:00 A.M. on Saturday, March 15, 1986. They identified themselves and met with him in an "attorney's room", approximately eight by twelve feet in size. The room had three chairs, a table, metal shelves, and window in the door. The door was closed.

41. Defendant had no contact with friends, family, or counsel prior to his meeting Sheriff West and Detective Curtis.

42. Sheriff West and Detective Curtis intentionally spoke with defendant for approximately forty minutes prior to advising him of his Miranda rights. The conversation was relaxed and friendly. The officers did not say why they were speaking with defendant but their purposes were to make him comfortable and relaxed, not scare him off, determine his intellectual capacity and emotional condition and facilitate both a waiver of his Miranda

rights and a successful interrogation. /1

43. Defendant and the officers discussed defendant's relatives who Sheriff West knew in Lamoille County, the officers' recent vacations, defendant's recent experiences in Boston, his trip to Florida, and the fact that he had been robbed.

44. Prior to being advised of his Miranda rights, defendant was not told that he was about to be interrogated about the death of Frank Evans.

45. At no time during the interrogation was the simple assault charge mentioned.

46. At 11:40 A.M. Sheriff West read the following rights to defendant:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to a lawyer before any questioning and to have him present with you during any questioning.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you at public expense before any questioning, if you wish. That is called a Public Defender.
5. If you decide to answer questions, you may stop the questioning at any time.

/1 Miranda v. Arizona, 384 U.S. 436, 444 (1966).

(State's Exhibit #1). After each right was read to him, defendant was asked if he understood that right, and each time he replied "yes." After the rights were read to him, he was asked if, having the rights in mind, he wanted to talk with the officers. He answered "yes."

47. Sheriff West read the section of the Miranda rights form entitled "waiver." The form indicated that he had been advised of his rights and understood them, that no threats or promises had been made to him, and that, knowing his rights, he agreed to waive them and to talk to the officers. No discussion was held or explanations given concerning this part of the form. Defendant signed the waiver. The officers did not tell him before he signed the waiver that the interrogation would concern the death of Frank Evans.

48. Approximately thirty minutes into the post-Miranda interrogation, defendant was asked if he knew Frank Evans was dead, to which he replied "no."

49. The officers told defendant that Evans had been murdered and that they knew defendant killed him. Defendant initially denied any guilt.

50. Approximately ninety minutes after being read his Miranda rights, defendant admitted that he had killed Frank Evans.

51. No part of the conversation before defendant confessed was tape recorded.

52. After defendant admitted killing Evans, the officers asked if they could tape the confession. Defendant agreed.

53. During a lunch break on March 15, the officers consulted with State's Attorney Trono who suggested what questions to ask defendant.

54. On March 16, 1986, after defendant was moved to the Volusia County jail, Sheriff West and Detective Curtis again questioned him to supplement the previous day's statements and to obtain a written confession.

55. Defendant had no contact with friends, family, or counsel between the March 15 and March 16 interviews. He was still in custody.

56. The officers again read the Miranda rights to defendant before they questioned him.

57. Defendant agreed to talk with the officers and to provide them with a written statement.

58. Detective Curtis asked defendant to write that no threats or promises had been made to get him to confess. Defendant wrote that no "threats of violence" had been used against him.

59. On March 17, 1986, defendant appeared in the Volusia County Circuit Court, was advised of his rights and waived extradition on the charge of assault.

60. On March 17, 1986, while being transported back

to Vermont from Florida, defendant told Sheriff West that he was sorry that he had lied to the officers at the beginning of the interrogation. The comment was not made in response to any question or remark by either of the officers. Defendant volunteered it.

61. Around midnight on March 17, 1986, defendant arrived in Vermont escorted by Sheriff West and Detective Curtis. The officers took defendant to the Barre City lock-up.

62. In the morning of March 18, 1986, Detective Curtis and Sheriff West met with State's Attorney Trono at his office.

63. The simple assault charge was on file with the Vermont District Court in Barre and no additional paperwork was required prior to arraignment on that charge.

64. The State's Attorney and the officers decided to obtain a "Vermont confession" prior to defendant's arraignment on a homicide charge being prepared.

65. A thirty page transcript of the March 15, 1986 confession had been prepared the previous day. It was decided to have defendant read this transcript and to have him ratify it and adopt his Florida confession while still at the Barre City Police Department. State's Attorney Trono, Sheriff West and Detective Curtis also decided to attempt to obtain a second written confession prior to

arraignment.

66. From 10:00 A.M. to 12:00 noon Detective Curtis and Sheriff West were at the State's Attorney's office preparing Detective Curtis' affidavit in support of probable cause on the homicide charge. The affidavit is one typed page.

67. Carolyn Hutchinson, the acting Clerk of the Vermont District Court in Barre on March 18, 1986, notified the offices of State's Attorney and County Sheriff that the defendant's arraignment was scheduled for 1:00 P.M. on all pending charges.

68. Detective Curtis and Sheriff West were aware that the clerk had requested that defendant be at the court between 12:30 and 12:45 to meet with a public defender.

69. Detective Curtis and Sheriff West went to the Barre City Police Department and met with defendant in the Sergeant's room. At 12:35 P.M. they advised him of his Miranda rights again; defendant signed a waiver form at 12:40 P.M. Defendant never indicated that he did not understand his rights, that he wished to assert any of them, that he did not wish to talk, or that he wanted to talk with a lawyer.

70. The plan was to obtain the "Vermont Confession" before taking the defendant to court for arraignment.

71. When the scheduled arraignment time came and

went, Ms. Hutchinson called the Police Department to determine the cause of delay and advised that the judge was waiting. She was told that the paperwork was not yet complete. Ms. Hutchinson suggested to State's Attorney Trono that the defendant be taken to court on the simple assault charge if the homicide paperwork was not yet complete.

72. Throughout the interrogation on March 18, defendant appeared alert and responsive. He did not appear to be under the influence of alcohol or drugs. He never indicated that he did not want to answer questions, or that he wanted to talk to a lawyer or to anyone else. He never indicated any unwillingness to review his earlier statement or to write out another statement. No promises or inducements were made to him. He was told that the judge was waiting.

73. Defendant took approximately an hour and a half to read over his earlier statement and to write out a new statement. The new statement did not contain any information not contained in earlier statements.

74. At 2:15 P.M. the officers took defendant to court where he met with his lawyer.

75. Defendant was formally charged with the murder of Frank Evans after his interrogation on March 18, 1986.

Conclusions of Law

Defendant supports his motion to suppress all statements on the following grounds: 1) that his arrest was made in violation of Florida law and without probable cause in violation of both the Vermont and United States Constitutions; 2) that all statements made after the arrest were tainted; 3) that police failed to advise defendant of his Miranda rights at the outset of their interview and all subsequent statements were received in violation of Vermont statutory and Vermont and federal constitutional law; 4) that defendant did not knowingly and intelligently waive his constitutional rights; 5) that police induced the March 15th confession through promises; 6) that defendant was denied his state constitutional right to counsel; and 7) that an intentional delay of defendant's arraignment violated the Vermont Rules of Criminal Procedure.

The court assumes, without deciding, that defendant's arrest was lawful. /2 Although he signed several waiver

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/2 The issue of pretextual arrests is before the United States Supreme Court this term. State v. Blair, 691 S.W.2d, 259 (Mo. 1985) cert. granted. 40 S.Ct. 4008 (1986). Resolution of the issue is unnecessary for the present motion.

forms, defendant contends, among other things, that his waiver of Miranda rights and subsequent confessions were not voluntary, knowing or intelligent. This court agrees and does not reach the other issues raised.

Both the Fifth Amendment to the United States Constitution and Chapter I, Article 10 of the Vermont Constitution protect individuals against compelled self-incrimination. An individual may waive those rights and any statement given voluntarily, knowingly, and intelligently is admissible in evidence. Miranda v. Arizona, 384 U.S. 436, 444 (1966). To be voluntary, "a confession must be the product of a rational intellect and the unfettered exercise of free will." State v. Zehner, 142 Vt. 251 (1982). The State has the burden to prove by a preponderance of the evidence that the confessions were voluntary and the waiver knowing and intelligent. Lego v. Twomey, 404 U.S. 477 (1972); Tague v. Louisiana, 444 U.S. 469 (1980); State v. Badger, 141 Vt. 430 (1982); State v. Harvey, 145 Vt. 654 (1985).

This court "must consider the totality of the factual circumstances in evaluating this issue of waiver." Badger, 141 Vt. 430, quoting North Carolina v. Butler, 441 U.S. 369, 374-75 (1979). In Badger, the defendant moved to suppress two confessions. The prosecution did not challenge the suppression of the first, which was obtained without Miranda warnings. The defendant in Badger was

sent home after his first confession, consulted with a psychologist, and arrived at the police station the next day, accompanied by his parents. He later made a second confession. The Vermont Supreme Court determined that the "coercive atmosphere, the youth of the defendant [16 years old], the absence of counsel and the threat of a lie detector test ... combined to render the second waiver suspect." Id. at 441-42.

The facts in this case are even more compelling. From the outset of the investigation, the team intended to question defendant in a "non-custodial" uncounseled, setting. When other efforts failed, a warrant was requested which ultimately led to the defendant's arrest in Florida. A Florida police officer told defendant that he was under arrest as a fugitive from justice for an underlying simple assault charge in Vermont. When the Vermont officers met with defendant he had been in custody for more than two days. During that time, he had no contact with family, friends, or counsel. The officers knew that defendant had requested and was assigned counsel on the fugitive charge. Despite that request, defendant never met with an attorney until March 18, immediately before his arraignment in Vermont.

On March 15, the officers engaged in a forty-minute, casual and friendly conversation before they warned him of his Miranda rights. The reading and purported waiver of

rights were made before the officers told defendant the subject matter of the questioning. After Sheriff West read each right from a standard "Miranda Warnings" form, defendant stated that he understood that right. When Sheriff West initially confronted defendant with the fact of Frank Evans death, defendant denied any involvement. Ninety minutes after the Miranda warnings were given, defendant admitted killing Frank Evans.

Custodial situations are inherently coercive. Miranda, 384 U.S. 436. On the facts of this case, the State has failed to convince the court otherwise. Defendant's lengthy, uninterrupted incarceration and isolation from family, friends and counsel strongly indicate that he did not voluntarily waive his rights. "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to techniques of persuasion ... cannot be otherwise than under compulsion to speak." Id. at 461.

The absence of counsel provides further evidence of involuntariness. Badger, 141 Vt. at 441. Neither the Florida nor Vermont authorities honored defendant's request to speak with an attorney. "The simple fact that the defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly." Michigan v. Jackson, 39 Cr.L. 3001, 3003, n.7 (1981), citing 365

N.W.2d at 67. The State urges this court to find that the prior request for counsel was limited to the fugitive charge. However, that charge was used to hold and question defendant about a murder. The State's fine distinction between the fugitive charge and the murder investigation is one without a difference when this court considers the validity of the waiver. Defendant requested counsel to deal with his situation, one created by the officers who interrogated him.

In Badger the absence of counsel was one factor the Vermont Supreme Court considered in evaluating the voluntariness of the defendant's waiver. Yet nothing in Badger indicates that the defendant had requested counsel. In this case, defendant's prior request for counsel before Florida authorities was ignored. Defendant testified that he believed a similar request of out-of-state (Vermont) authorities would have been to no avail. This court cannot dismiss that belief as without basis.

Another factor in the totality of the circumstances analysis is whether the defendant was informed of the subject matter of questioning prior to the administration of Miranda rights. In this case he was not. The issue is before the United States Supreme Court in People v. Spring, 713 P.2d 865 (Colo. 1985) cert granted, 106 S.Ct. 1961 (May 5, 1986). In Spring the Colorado Supreme Court considered the police failure to inform a suspect of the

subject matter of interrogation as one factor among the totality of the circumstances. It upheld a reversal of the defendant's first degree murder conviction.

The Vermont Supreme Court applied the same standard when it determined that a defendant revoked an earlier waiver of Miranda rights. State v. Mosher, 143 Vt. 197 (1983). The court stated:

> The fact that defendant clearly was under the misimpression that he had been asked to come to the police station regarding his complaint of a stolen car, and that he signed the Miranda waiver form while under that misimpression, casts considerable doubt on the effectiveness of the initial waiver.

Id. at 203. The court concluded "in light of the totality of the circumstances, the conduct of the eighteen-year-old defendant amounted to a revocation of his earlier waiver of Miranda rights." Id. at 204.

When the defendant in the present case signed a waiver form, he knew only that he was under arrest for a simple assault charge in Vermont. That limited knowledge led to a misimpression that the officers intended to question him about the assault. Failure to inform the defendant of the subject matter of questioning, although not dispositive, is an additional factor supporting defendant's argument that his waiver was unknowing and involuntary.

Defendant's personal characteristics further support a finding of involuntariness. A nineteen year old suspect with an eighth grade education and no prior incarceration was confronted by two police officers in a small, closed room located in a prison far from home. The State has not proven that the confrontation was anything but coercive.

Given the totality of the factual circumstances, the State has not carried its burden to prove that defendant's waiver of rights on March 15 was voluntary, knowing, and intelligent. Prolonged incarceration, defendant's youth and limited education, isolation from family and friends, relative unfamiliarity with the criminal justice system, absence of counsel, and failure to warn of the subject matter of questioning combine to suggest that the defendant's free will may have been overpowered. The State has not proven that his confession was "the product of a rational intellect and exercise of free will." Zehner, 142 Vt. 251. The court must therefore conclude that the March 15 confession was obtained in violation of both the Fifth Amendment and Chapter I, Article 10 and must be suppressed.

The inquiry whether subsequent confessions should also be suppressed involves two elements. The first is causation. The second is whether "granting the establishment of the primary illegality, the evidence to which the instant objection is made has been come to by

exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 372 U.S. 471, 488 (1963); State v. Jewett, No. 83-478, slip op. at 4, 5 (Vt. filed August 14, 1986); see also Badger, 141 Vt. at 439.

The causal nexus between the first and subsequent confessions is clear. The police elicited a statement on March 16 to supplement the previous day's oral confession and to obtain a written confession. On March 17, defendant volunteered a statement that directly referred to the March 15 confession. The purpose of the March 18 statement was to obtain a "Vermont confession" based on statements previously made.

No events intervened to break that causal link. Defendant's custody was continuous. He had no contact with family, friends, or counsel. The circumstances that led this court to find that the initial statement was involuntary did not change. Miranda warnings, without more, do not establish voluntariness. Nor are they sufficient to purge the taint of the primary illegality. See Badger, 141 Vt. at 440.

The State relies on subsequent administration of Miranda warnings as evidence that the March 16 and 18 statements was voluntary. In Oregon v. Elstad, 105 S.Ct. 1285, 1298 (1985) the United States Supreme Court held that "a suspect who has once responded to unwarned

yet uncoerced questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." The Court found that the defendant's initial statement was voluntary and dealt only with a technical violation of Miranda. It determined that "the relevant inquiry is whether ... the second statement was also voluntarily made." Id. In this case defendant's initial statement was not voluntary and the Elstad holding is inapplicable. The State has not convinced this court that the circumstances surrounding either the March 16 or March 18 confession changed sufficiently to purge the taint of the first, involuntary, confession.

The State has failed to prove by a preponderance of the evidence that defendant voluntarily confessed, and knowingly, and intelligently waived his rights.

Order

Accordingly, defendant's motion to suppress statements he made from March 15, 1986 through March 18, 1986 is GRANTED.

Dated this 16th day of December, 1986.

Alan W. Cook
District Judge

FILED
OCT 21 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. 88-371

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF VERMONT,
Petitioner,

v.

RICK A. PRESTON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

PETITIONER'S REPLY BRIEF

SUSAN R. HARRITT
Counsel of Record
Office of the Attorney General
State of Vermont
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

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IN THE

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STATE OF VERMONT,

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RICK A. PRESTON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

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PETITIONER'S REPLY BRIEF

ARGUMENT

FOR PURPOSES OF 28 USC § 1257, THE DECISION OF THE VERMONT SUPREME COURT IS FINAL.

Alleging lack of finality, Respondent contends that this Court should deny the Writ of Certiorari, because Petitioner sought clarification of the State Supreme Court's decision. Petitioner did and continues to seek clarification of two sentences of the state court's decision dealing with an inconsistent recitation of fact. *See* Pet. 1, note 1 and Appendix to Reply Brief 14a. However the pendency of this motion, App. to R.B. 14a, or its predecessor, App. to R.B. 1a, does not change the "final" character

of the Court's order of July 1, 1988. App. 9a. In fact, the Vermont Supreme Court has declared that one clarification, as requested by Petitioner, "does not affect the result and the motion is denied." App. to R.B. 4a.

These motions filed by Petitioner sought correction of the Vermont Supreme Court's erroneous description of certain factual events that had transpired during the investigatory phase of the case. Claims of this kind have been addressed before by this Court. "The final judgment already rendered was not challenged; what was sought was merely the Court's certification that a federal question had been presented to it for a decision, and *this could have no different effect on the finality of the judgment then a like amendment of the Court's opinion.*" *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942) (emphasis added). The State's request is analogous to the situation discussed in Pink.

More recent case law is in accord. In *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 373 n.10 (1984), this Court observed that ". . . the rule requiring suspension of a judgment's finality for purposes of appeal during the pendency of a postjudgment motion for reconsideration applies *only* when such a motion actually seeks an "alteration of the rights adjudicated" in the Court's first judgment." *Ibid.*, quoting from *Department of Banking v. Pink*, 317 U.S. at 266. In the instant case the Court is urged to give the finality requirement "a practical rather than a technical construction", *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 541-547 (1949), since the sought-after correction relates to a factual aspect of the opinion and is not aimed at altering the result in the state court's decision on the federal issue raised by Petitioner.

The pendency of a motion for clarification in this case presents an example of the type of situation addressed in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 *et seq.* (1975), that justifies a departure from the fi-

nality rule. In *Cox Broadcasting Corp.*, this Court recognized that there was no reason to await completion of "additional proceedings anticipated in the lower state courts" since "these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice'. . . ." *Id. at* 477-78, quoting from *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Since the result here is preordained, *i.e.*, under the state's court interpretation of federal constitutional law Respondent's confession must be suppressed, the purpose underlying the finality provision in 28 U.S.C. § 1257 is satisfied.

CONCLUSION

Based on the foregoing argument, the decision appealed from by petitioning for Writ of Certiorari is final for purposes of 28 U.S.C. § 1257. The Writ should not be denied.

Respectfully submitted,

SUSAN R. HARRITT
Counsel of Record
Office of the Attorney General
State of Vermont
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

Dated: October 21, 1988

APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF VERMONT

Supreme Court Docket No. 87-023

STATE OF VERMONT

v.

RICK A. PRESTON

MOTION FOR REARGUMENT

NOW COMES the State of Vermont, by and through the Attorney General of the State of Vermont, and moves this Court for reargument pursuant to V.R.A.P. 40, in the above-captioned matter, on the grounds that the Court has misapprehended certain points of fact, as set out in the accompanying memorandum.

MEMORANDUM IN SUPPORT OF MOTION

The opinion of the Court in this case, as revised following the Defendant's Motion for Reargument, contains two factual assertions contradicted by the trial court's findings of fact. Neither party challenged the findings of fact, and the findings on these two issues were supported by the evidence, and so must be upheld by this Court. *State v. Baxter*, 145 Vt. 295, 297 (1984).

The first incorrect factual assertion is contained on page 2 of the slip opinion, and states:

> The team decided to obtain an arrest warrant on the simple assault charge and to use this *pretext* as

> a means of finding defendant and questioning him regarding the homicide.

(Emphasis supplied). Contrary to this assertion, the trial court specifically rejected the contention that the arrest warrant was obtained as a pretext:

> The officers investigating the homicide had no concern with the prosecution of the misdemeanor assault charge. The State's Attorney, however, would have prosecuted this charge and requested a warrant in the normal course of business.

Trial Court's Opinion, finding 16, Printed Case at p. 55. Although the trial court did find that the Defendant would not have been *extradited* absent suspicion that he had been involved in a murder, this Court made no such distinction between the arrest warrant and the decision to extradite. This distinction is significant because an arrest warrant must be supported by probable cause and approved by a judicial officer. The decision to extradite is a discretionary decision by the prosecutor, and many factors may properly influence that decision.

In addition, the trial court specifically refused to decide whether the circumstances of the Defendant's arrest in Florida was pretextual, and, if so, unlawful. The trial court stated, "The court assumes, without deciding, that defendant's arrest was lawful." Printed Case at p. 66.

The second incorrect factual assertion is that "defendant asked that an attorney be appointed to represent him in dealing with the State, *and he continued his efforts to consult counsel while he was being held in custody.*" Slip opinion at p. 7 (emphasis supplied). In fact, the trial court specifically rejected, as not credible, the Defendant's testimony that he had continued his efforts to consult counsel while he was being held in custody. The trial court stated:

> Defendant testified without corroboration that he requested counsel five to ten times while he was in jail. Based on credible evidence, the court finds that he made one written and one oral request for counsel. At no time did he meet with an attorney.

The Defendant testified that at his arraignment he filled out a form requesting a lawyer, and then orally requested an attorney when asked by the judge. Preston transcript, pp. 8-9. In other words, at the arraignment, he made one written and one oral request for counsel, as the trial court found. The Defendant also testified that he orally requested counsel five to ten times while in the cellblock. Preston transcript, pp. 11-12. The trial court rejected this testimony as not credible. Accordingly, the trial court found that the Defendant had *not* "continued his efforts to consult counsel while he was being held in custody."

This fact is significant to the Court's opinion because the Court relied upon it in its holding that the Defendant had asserted, at his araignment, not only his Sixth Amendment right to the assistance of counsel in his defense, but also, prior to any attempt at interrogation, his Fifth Amendment right to the presence of counsel during interrogation. Slip opinion at p. 7.

Dated: July 8, 1988

STATE OF VERMONT

JEFFREY L. AMESTOY
Attorney General

by: /s/ David Tartter
DAVID TARTTER
Assistant Attorney General

cc: Stephen S. Blodgett, Esq.
Terry Trono, Esq.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF VERMONT

June Term, 1988

Supreme Court Docket No. 87-023

STATE OF VERMONT

v.

RICK A. PRESTON

[Filed Sept. 2, 1988]

Appealed from District Court of Vermont,
Unit No. 3, Washington Circuit

Docket No. 332-3-86WnCr

ENTRY ORDER

In the above entitled cause the Clerk will enter:

In response to the motion for reargument filed by the State on July 11, 1988, a minor revision has been made in the opinion. The change does not affect the result, and the motion is denied.

BY THE COURT:

/s/ Frederic W. Allen
FREDERIC W. ALLEN
Chief Justice

/s/ Louis P. Peck
LOUIS P. PECK
Associate Justice

/s/ Albert W. Barney
ALBERT W. BARNEY
Chief Justice (Ret.)
Specially Assigned

/s/ F. Ray Keyser
F. RAY KEYSER
Associate Justice (Ret.)
Specially Assigned

/s/ Edward J. Costello
EDWARD J. COSTELLO
District Judge (Ret.)
Specially Assigned

APPENDIX C

SUPREME COURT

May Term, 1987

No. 87-023

STATE OF VERMONT

v.

RICK A. PRESTON

[Filed Sept. 2, 1988]

On Appeal from District Court of Vermont,
Unit No. 3, Washington Circuit

Alan W. Cook, J.

Jeffrey L. Amestoy, Attorney General, and David Tartter, Assistant Attorney General, Montpelier, for plaintiff appellant

Stephen S. Blodgett and Paul S. Volk of Blodgett & Watts, Burlington, for defendant-appellee

Present: Allen, C.J., Peck, J., and Barney, C.J. (Ret.), and Costello, D.J. (Ret.), Specially Assigned

COSTELLO, D.J. (Ret.), Specially Assigned. On January 20, 1986, Frank Evans was found murdered in his Barre apartment. While in custody on a unrelated charge, defendant confessed to the crime. He later filed

a motion seeking to have his confession suppressed, and the district court granted the motion, ruling that his confession was involuntary and that the purported waiver of his Fifth Amendment rights was invalid. The state brought this interlocutory appeal pursuant to V.R.A.P. 5(b), and we affirm.

The trial court's detailed findings of fact describe the following sequence of events. An investigation team was formed soon after the murder, consisting of the Washington County state's attorney, an investigator from that office, and detectives from the Barre City police department and the Washington County sheriff's department. Defendant, who had resided with the victim, was regarded as the principal suspect, but he could not be located. The investigating team then became aware of unrelated, simple assault charges that had been pending against defendant since a New Year's Eve fracas in Montpelier. The assault citation required defendant to appear in court for arraignment on February 3, 1986, and the team planned to make contact with him at that time. Because the team wished to question defendant in a noncustodial setting and without the presence of counsel, the state's attorney decided not to file the information and affidavit regarding the assault charge.

Defendant failed to appear for the scheduled arraignment, however, and efforts to locate him continued to be unavailing. The team decided to obtain an arrest warrant on the simple assault charge and to use this pretext as a means of finding defendant and questioning him regarding the homicide. An information was filed on February 7, 1986, and a warrant was issued based on his earlier failure to appear. An investigator from the state's attorney's office circulated a nationwide "wanted person" bulletin, using the National Crime Information Center (NCIC) computer.

On March 13, 1986, defendant was arrested in Florida and arraigned as a fugitive from justice. At arraign-

ment on this charge he requested counsel, and the court appointed a public defender. The Vermont investigation team was informed of the arrest and immediately left for Florida to interrogate him. Upon arrival, the team was informed that defendant had been assigned counsel on the fugitive from justice charge and that he was being held in custody pending further proceedings on that charge. However, the team members made no effort to contact the appointed counsel before questioning him.

A Barre City police detective and the Washington County sheriff met with the defendant, who was still in custody, on March 15, 1986, two and one-half days after his arraignment. Defendant had yet to consult with his appointed attorney, although he had requested such a meeting once in writing and at least once orally.

The two police officers began their interrogation with amicable conversation about defendant's travels to Florida and about mutual acquaintances in Vermont. Forty minutes after they began questioning him, the officers read a *Miranda* warning. Defendant was asked if he understood each right after it was read to him, and he indicated that he did. Defendant then orally agreed to waive those rights, and the interrogation proceeded.

Approximately thirty minutes after the *Miranda* warning was given, defendant was asked about the Evans murder. At no time until this point, approximately one hour and fifteen minutes after confronting him, had the officers mentioned the homicide investigation. Although he initially denied the murder, defendant confessed his guilt soon after he was questioned directly about the killing. He then agreed to a taped interview, which was conducted after the two police officers consulted with the state's attorney about the questions to be asked. The following day, March 16, 1986, defendant signed a written confession.

On March 17, 1986, defendant waived extradition and was transported back to Vermont. A second written con-

fession was obtained on the morning after his arrival. Subsequently, he met with counsel for the first time since his arrest in Florida, and was then arraigned on a charge of first degree murder.

Defendant later filed a pretrial motion to suppress all inculpatory statements, written and oral, made to the investigating team. After a series of hearings, the trial court issued findings of fact and conclusions of law and granted defendant's motion. The ruling was based upon a "totality of the circumstances" analysis, and significant weight was assigned to the following factors: defendant's age of nineteen years, his eighth grade education, his inexperience with the criminal justice system, his isolation for more than two days prior to interrogation, and the absence of counsel. The court also emphasized the investigation team's intent to question defendant in a noncustodial, uncounselled setting and their failure to inform defendant regarding the subject matter of the questioning. The court concluded that the State had failed to prove either that defendant's *Miranda* waiver was voluntary, knowing, and intelligent or that his confession was voluntarily given. We affirm the court's ruling on the suppression motion, but we do so on other grounds.

The State argues first that the trial court erred in relying upon the factors cited in its totality of the circumstances analysis. It is unnecessary to address that contention, however, because the trial court's approach was rendered inapplicable by a single factor: defendant's request for counsel. Once a criminal defendant has invoked his right to counsel under the Fifth Amendment,*

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* The Fifth and the Sixth Amendment provide a criminal defendant with two distinct rights to counsel. No Sixth Amendment analysis is included here because the constitutional right to counsel under that Amendment had not yet attached at the time of the interrogation regarding the murder. The Sixth Amendment right to counsel attaches only when a "critical stage of the prosecution"

he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). If the authorities initiate further interrogation in these circumstances, then any waiver of the defendant's right to counsel for that interrogation is invalid. *Michigan v. Jackson*, —— U.S. ——, 106 S. Ct. 1404, 1411 (1986).

Here, the lower court found that defendant requested counsel at his Florida arraignment on the fugitive from justice charge and that he made further requests to see his attorney while he was incarcerated. That court's findings also indicate that, despite this state of affairs, the investigation team proceeded to interrogate him in an uncounselled setting. Therefore, under the "bright line" rule enunciated in *Edwards* and its progeny, we hold that the trial court was correct in concluding that defendant's waiver of his Fifth Amendment rights was invalid. In reaching this conclusion, we acknowledge that two key issues are raised by the facts of this case: (1) whether defendant invoked this Fifth Amendment right to counsel at the Florida arraignment, and (2) whether any such invocation remained effective at the subsequent interrogation.

In *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir. 1987), *cert. denied*, 107 S. Ct. 3240 (1987), the Seventh Circuit resolved these same issues in the context of a markedly similar factual situation. There, as here, defendant Espinoza was arrested and arraigned on a relatively minor charge. He requested counsel, and a public defender appeared on his behalf at the

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begins. *United States v. Wade*, 388 U.S. 218, 237 (1967). As the Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436 (1966), however, the Fifth Amendment provides "an individual held for interrogation . . . the right to consult with a lawyer and to have the lawyer with him during the interrogation." *Id.* at 471.

arraignment. While Espinoza remained in custody, police investigation indicated his possible involvement in a recent homicide. In the interview that followed, Espinoza waived his rights under *Miranda* and confessed to the murder.

After Espinoza's conviction on the murder charge was affirmed on appeal, a federal district court granted a habeas corpus petition, ruling that his confession should have been suppressed. The Seventh Circuit upheld the district court's decision on Fifth Amendment grounds, and its opinion included a painstaking analysis of the very issues presented here.

First, because Espinoza did not assert his constitutional rights at the interrogation itself, the court set out to determine whether his earlier request for counsel at the arraignment constituted an invocation of his Fifth Amendment right to counsel. Citing *Michigan v. Jackson*, —— U.S. ——, 106 S. Ct. 1404 (1986) and *Connecticut v. Barrett*, —— U.S. ——, 107 S. Ct. 828 (1987), the court rejected the state's argument that this request was no more than an assertion of Espinoza's Sixth Amendment right as an accused in that particular prosecution. *Jackson* and *Barrett* make clear, as the court explained, that a broad interpretation must be given to a defendant's request for counsel, and that a court must presume, absent evidence to the contrary, that such an individual has invoked the full extent of his constitutional right to counsel. See *Jackson*, —— U.S. at ——, 106 S. Ct. at 1409 and *Barrett*, —— U.S. at ——, 107 S. Ct. at 832. Therefore, the *Espinoza* court reasoned, it must be presumed that a defendant who requests or accepts counsel at an arraignment is invoking both his Sixth Amendment and his Fifth Amendment rights. *Espinoza*, 813 F.2d at 123. Because the state presented no evidence indicating that Espinoza intended to limit his invocation to the Sixth Amendment, the court concluded that his unqualified acceptance of counsel at the

arraignment was an assertion, rather that a waiver, of his Fifth Amendment right. *Id.*

The Seventh Circuit went on to decide whether this invocation at the arraignment remained effective at the subsequent, but unrelated, murder interrogation. The court first held that, once asserted, the Fifth Amendment right to counsel terminates "only when the heightened potential for state-coerced self-incrimination ends—upon the release of the individual from police custody." *Id.* at 125. The court then concluded that Espinoza's invocation of his right at the arraignment also extended to the later interrogation regarding the murder. *Id.* at 126. If the rule were otherwise, the court reasoned, then the prophylactic purpose of the Fifth Amendment would be defeated because the heightened possibility of state "overreaching" continues to exist regardless of the timing or the subject matter of custodial interrogation. Citing *Edwards v. Arizona*, 451 U.S. at 484-85, the court held that the waivers obtained from Espinoza at the murder interrogation were invalid because the state initiated the questioning.

We adopt the reasoning of the Seventh Circuit. Here, defendant asked that an attorney be appointed to represent him in dealing with the State. We will not assume that defendant was in some way limiting his request for legal counsel; indeed, we must presume that defendant was invoking both his Sixth Amendment right and his Fifth Amendment right to counsel, and the State has not shown otherwise. As the Supreme Court has observed, an individual requesting counsel at his arraignment does not know which constitutional right he is invoking. *Jackson*, —— U.S. at ——, 106 S. Ct. at 1409-10 n.7 (quoting *Michigan v. Jackson*, 421 Mich. 39, 63-64, 365 N.W.2d 56, 67 (1984)). We hold that defendant's invocation of his Fifth Amendment right remained effective at the time of the interrogation, and that, because the State imper-

missibly initiated that interrogation, his purported waivers of this right were invalid.

Affirmed.

FOR THE COURT:

/s/ Edward J. Costello
EDWARD J. COSTELLO
D.J. (Ret.)
Specially Assigned

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF VERMONT

Supreme Court Docket No. 87-023

STATE OF VERMONT

v.

RICK A. PRESTON

MOTION FOR CLARIFICATION

Now Comes the State of Vermont, by and through the Attorney General of the State of Vermont, and moves this Court for clarification of its recently issued revision of its opinion in the above-captioned case.

Due to inadvertence on the part of the State in its July 8, 1988 Motion for Reargument, the Court was directed to a single place in the record at page 7 containing an inaccurate factual description of the appellant's behavior concerning his request for counsel. The Court agreed and deleted the language as requested by the State.

The State did not, however, direct the Court's attention to a *second*, and essentially identical description of appellant's behavior while incarcerated, at page 5 of the Court's decision issued on July 1, 1988. See underlined excerpt from page 5 of the reissued decision, dated September 2, 1988: "Here, the lower court found that defendant requested counsel at his Florida arraignment on the fugitive from justice charge *and that he made fur-*

ther requests to see his attorney while he was incarcerated."

The deletion by the Court of language formerly appearing on page 7 in the July 2nd opinion (". . . and he continued his efforts to consult counsel while he was being held in custody.") creates an internal inconsistency in the decision. The transcript of the suppression hearing at pp. 8-9 clearly demonstrates that the court's finding in paragraph 31 [1] could only mean that the defendant made one oral and one written request for counsel prior to and at his arraignment. Now, because of the State's aforesaid inadvertence, the Court's present summary of the trial court's findings is in conflict with the latter portion of its own opinion. Striking the incorrect language at page 5 as this court struck the same language at page 7, will vitiate the conflict.

Dated: September 9, 1988

STATE OF VERMONT

JEFFREY L. AMESTOY
Attorney General

by: /s/ David E. Tartter
DAVID E. TARTTER
Assistant Attorney General

cc: Stephen Blodgett, Esq.
Terry Trono, Esq.

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[1] Paragraph 31 of the trial court's findings provided as follows: "Defendant testified without corroboration that he requested counsel five to ten times while he was in jail. Based on credible evidence, the court finds that he made one written and one oral request for counsel. At no time did he meet with an attorney."